

XYZ TELEVISION, INC.

IBLA 76-739

Decided September 30, 1977

Appeal from decision of the Colorado State Office, Bureau of Land Management, imposing new increased charges for right-of-way. CO-943(B), C-011951-R/W.

Set aside and remanded.

1. Appraisals--Federal Land Policy and Management Act:
Rights-of-Way--Rights-of-Way: Act of March 4, 1911

Under 43 CFR 2802.1-7(e), the charge for a right-of-way on public lands may be revised upon compliance with procedural requirements at any time 5 years or more from the date when the rate was initially established.

APPEARANCES: Warren L. Turner, Esq., and Carl Q. Anderson, President, XYZ Television, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

XYZ Television, Inc., has appealed from the decision of the Colorado State Office, Bureau of Land Management, imposing new charges for appellant's existing right-of-way, C-011951-R/W, granted pursuant to the Act of March 4, 1911, 43 U.S.C. § 961 (1970). ^{1/} The application of appellant's predecessor for a 50-year right-of-way was approved January 18, 1956.

^{1/} Repealed, Federal Land Policy and Management Act of 1976, § 706, 90 Stat. 2743, 2793. Rights-of-way are now governed by Title V of that Act, 43 U.S.C. § 1761 et seq. (197). Existing regulations still govern rights-of-way "to the extent practical." FLPMA, § 310, 43 U.S.C. § 1740 (197).

The State Director requested that the Board rule on a portion of the appeal and remand the case for reconsideration. The case must be remanded because the decision to increase the charges for the existing right-of-way had been made without providing appellant with notice and an opportunity to be heard, as required by 43 CFR 2802.1-7(e). American Telephone and Telegraph Company, 25 IBLA 341, 346 (1976). Furthermore, the 1976 decision not only sought to impose the new rental rate for the ensuing charge year beginning January 1, 1977, but also would have imposed that rate retroactively for the period from January 1, 1974, to December 31, 1976.

In a subsequent request for reconsideration, the State Office had noted that such retroactive imposition of charges would be inconsistent with Instruction Memorandum 77-217, issued April 20, 1977, which provides that new charges for existing rights-of-way may not be imposed retroactively, but must be imposed prospectively, effective as of the beginning of the charge year following the rate adjustment decision.

[1] One issue raised by appellant requires resolution on appeal. Appellant, contends that no new charge may be established for any period prior to January 1, 1979, because appellant has already paid a charge of \$365 for the 5-year period commencing January 1, 1974. Appellant contends that this charge was established by the Notice of Payment Due for the 5-year period commencing January 1, 1974, and the regulations preclude any revision from taking effect during this period. Departmental regulation 43 CFR 2802.1-7(e) provides as follows:

At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year.

Section 2802.1-7(e) thus allows for revision of charges at any time more than 5 years after the last revision of charges. Because the payment required on January 1, 1974, was at the same rate as the charge for the previous years, the Notice of Payment Due did not constitute a revision of charges within the meaning of the regulations. Accordingly, the charge was subject to revision upon compliance with the appropriate procedural requirements at any time 5 years or more from the date when that rate was initially established.

Because of the requirement for opportunity for hearing discussed above, appellant's request for a hearing will be accorded in connection with the Bureau of Land Management proceedings, prior to any increase in charges.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further action consistent with this decision.

Joseph W. Goss
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Frederick Fishman
Administrative Judge

